Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 2002

MAHMOOD YOONESSI,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FOURTH JUDICIAL DEPARTMENT.

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTION PRESENTED

1. Whether a state appellate court's summary dismissal of a tenured professor's direct claim against his employer, the State University of New York, improperly restricted the petitioner from proving a pattern of bad faith, discriminatory, or arbitrary conduct on the part of his union, a necessary element of the claim, in violation of this court's precedents and the petitioner's rights to due process and equal protection of the laws pursuant to the Fifth and Fourteenth Amendments to the United States' Constitution?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT OF CERTIORARI 5

CONCLUSION 9

INDEX TO APPENDICES

Page

APPENDIX A
Order of the New York Court of Appeals
filed July 2, 2002 ..... 1a

APPENDIX B
Order of the New York Supreme Court,
Appellate Division, Fourth Department
filed March 15, 2002 ..... 3a

APPENDIX C
Order and Decision of the New York
Supreme Court, Appellate Division,
Fourth Department filed December 21, 2001 ..... 4a

APPENDIX D
Order of the New York Court of Claims
dated August 25, 1999, filed September 9, 1999 ..... 8a

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Air Line Pilots Association, International v. O'Neill, 499 U.S. 65 (199) 8

Drake Bakeries, Inc. v. Local 50, Am. Bakery Workers, 370 U.S. 254 (1962) 6

Vaca v. Sipes, 386 U. S. 171 (1967) 6, 7

Petitioner Mahmood Yoonessi respectfully prays that a writ of certiorari issue to review the order of the New York Supreme Court, Appellate Division, Fourth Department , filed December 21, 2001.

OPINIONS BELOW

On July 2, 2002, the New York State Court of Appeals denied the petitioner's motion for leave to appeal from the December 21, 2001 order of the Appellate Division, Fourth Department.

The New York Court of Appeals' decision denying discretionary review of the Appellate Division's order is reproduced at Appendix 1a and is reported at 98 N.Y. 2d 609, 746 N.Y.S. 2d 693, 774 N.E. 2d 758 (2002).

The Appellate Division, Fourth Department denied Dr. Yoonessi's motion for leave to appeal to the New York Court of Appeals, in an order issued March 15, 2002, reported in table form at 742 N.Y.S. 2d 591, and reproduced at Appendix 3a.

On December 21, 2001, the New York Supreme Court, Appellate Division, Fourth Department, affirmed the dismissal of the petitioner's claim. The Appellate Division's memorandum decision, reported at 289 A.D. 2d 998, 735 N.Y.S. 2d 90, is reproduced at Appendix 4a. The unreported order of the New York Court of Claims (Lane, J.) dated August 25, 1999 and filed September 9, 1999, granting the respondent's motion for summary judgment and dismissing the petitioner's claim, is reproduced at Appendix 8a.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 USC §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States' Constitution.

Amendment V

No person shall...be deprived of life, liberty, orproperty, without due process of law...

Amendment XIV

...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Proceedings

In a decision entered September 9, 1999, the New York Court of Claims (Lane, J.) granted the defendant's motion for summary judgment and dismissed claim No. 91461 (See **Appendix D** hereto).

On December 21, 2001, the New York Supreme Court, Appellate Division, Fourth Department affirmed the order of the Court of Claims (Lane, J.) **(Appendix C)**.

On February 1, 2002, the petitioner, timely served and filed a motion to the Appellate Division, Fourth Department for leave to appeal to the New York Court of Appeals, together with proof of service. On March 15, 2002, the Appellate Division denied Dr. Yoonessi's motion for leave to appeal to the Court of Appeals **(Appendix B)**.

On July 2, 2002, the New York State Court of Appeals denied the petitioner's motion for leave to appeal **(Appendix A)**.

Facts

The petitioner filed the instant action against the State of New York in 1995 for breach of contract, conversion and discriminatory treatment arising from claimant's work as a physician and tenured faculty member of the State University of New York (SUNY) (R. 251-282). Part of Dr. Yoonessi's claim involves the Union of University Professionals (UPP) and whether it breached its duty to represent him fairly in connection with an employment dispute stemming from Dr. Yoonessi's request for an accounting with respect to professional services performed as part of the University Faculty Practice Plan. The claims for professional fees and the alleged discriminatory treatment of Dr. Yoonessi arose while claimant was a physician and tenured Associate Professor at the State University (R. 307-327, 3-4).

The trial court concluded that principles of collateral estoppel and *res judicata* barred Dr. Yoonessi's claims. The Appellate Division affirmed, finding, as a matter of law, that the claimant cannot show that his union breached its duty of fair representation, an essential element of the claimant's breach of contract claim against the State.

REASONS FOR GRANTING THE WRIT

This case presents the important question of how a public employee may prove that his union acted arbitrarily or in bad faith, a necessary element of a direct claim against the employer based on breach of the union's duty of fair representation. Both the trial court and the Appellate Division disregarded a series of events establishing UUP's conflict of interest, bad faith, delay and arbitrary conduct over the course of more than five years, arising from petitioner's request for an accounting of money owed to him under the Faculty Practice Plan.

The trial court's finding of fair representation by claimant's union as a matter of law was clearly erroneous in the light of a plethora of factual issues raised below (R.299-327). Claimant now faces disciplinary proceedings in the Department of Health arising from the same incidents the UUP claims to have put to rest as part of the "global settlement" reached with the defendant in 1996 (R.146-148), thereby further undermining the determination of fair representation as a matter of law. Moreover, the petitioner has never received the financial benefit of UUP's settlement and the petitioner's inquiries to the State University and UUP regarding the whereabouts of the $75,000 UUP purportedly procured through the 1994-1996 settlement have essentially been ignored.

Although Court of Claims Judge John Lane recognized that prior orders in the case established "that the PERB [New York Public Employment Relations Board] proceedings had no binding effect on this Court because claimant had not had a full and fair opportunity to litigate the issues of his claim in those proceedings" (R. 15), that issue was never dealt with in Judge Lane's order or the Appellate Division's decision.

Since the petitioner did not have a full and fair opportunity to litigate the issues of his claim in the PERB proceedings or in prior federal court civil rights proceedings, and it is not disputed that some of the claims are not barred by the Statute of Limitations (R.20, see Judge Lane's recognition of allegations not yet time-barred), dismissal of Dr. Yoonessi's claims as a matter of law on collateral estoppel and *res judicata* grounds, was clearly erroneous, a denial of due process and a denial of equal protection of the laws under the Fifth and Fourteenth Amendments to the United States Constitutions.

In Vaca v. Sipes, 386 U.S.171 (1967), this Court balanced the exhaustion requirements presented by exclusive procedures established by collective bargaining agreements against the problem which arises when a union breaches its duty of fair representation of the individual employee. Citing Drake Bakeries, Inc. v. Local 50, Am. Bakery Workers, 370 U.S. 254, 260-263 (1962), the Court in Vaca reiterated the principle that employees should not be limited to the exclusive remedial procedures established by the collective bargaining contract when the conduct of the employer amounts to a repudiation of those contractual procedures. A review of the procedural history of the case outlined in the Court of Claims decision by Judge John P. Lane (Appendix D hereto, pp. 10a - 21a) establishes a clear basis for such a claim here. A further ground for the instant claim, cited by this court in Vaca v. Sipes, is that an employee may seek judicial enforcement of his contractual rights if the union has sole power under the contract to invoke the higher stages of the grievance procedure and the employee has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance.

In the instant case, the trial judge recognized that allegations related to negotiations involving the UUP's so-called global settlement and exchange of letters in December 1994 and the subsequent consummation of the settlement and communication of it to claimant in May 1996 were not time-barred (Appendix D, p. 23a). Such allegations were sufficient to create an issue of fact as to the claimed breached of the duty of fair representation, pursuant to this Court's analysis in Vaca v. Sipes, supra, 386 U.S. at 184. Under established precedent of this Court, a wrongfully discharged employee may bring an action against his employer in the face of a defense based on a failure to exhaust contractual remedies, provided the employee can prove that the union, as bargaining agent, breached its duty of fair representation in its handling of the employee's grievance.

The Appellate Division affirmed Judge Lane's ruling that a prior federal action and New York administrative claims barred petitioner's timely claims based upon a breach of duty of fair representation, citing collateral estoppel principles involving a claim of discrimination based on petitioner's status as an Iranian-American, and UUP's failure to proceed with grievances. However, the petitioner's direct claim against his employer was not based solely on discrimination and could not have been precluded by the narrow finding in the previously decided federal claim or claims involved in the administrative proceeding. Pursuant to Vaca v. Sipes, a union's breach of the statutory duty of fair representation occurs when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. At most, the prior decisions upon which the Court of Claims and the Appellate Division grounded their collateral estoppel findings, dealt with a discriminatory claim based on petitioner's race, and failure to pursue grievances. Patently wrongful conduct includes racial discrimination, but also includes personal hostility, bad

faith conflicts of interest and arbitrary conduct. Petitioner alleged and provided proof that UUP had a conflict of interest since it also represented members of the Faculty Practice Plan against whom petitioner had lodged claims of financial fraud.

By granting summary judgment on the ground that there were no material issues of fact on the issue of duty of fair representation, the courts below expressly ignored evidence of a pervasive pattern of bad faith with respect to the union's failure to follow through with the processing of grievances and mediation settlement with respect to other physician's improper labor practice claims based on medical practice payments. The trial court found that petitioner's claims regarding documents misplaced, mishandled or lost by SUNY employees in March 1991, as well as UUP's numerous refusals to proceed with hearings, fell outside the statute of limitations. However, such facts were pieces of evidence which should have been considered in connection with the bad faith claim. The history of the union's activities must be considered in determining whether there was bad faith or arbitrary or discriminatory conduct on the part of the union with respect to the protection of the petitioner's contractual rights. As stated by the Court in Airline Pilots Association, International v. O'Neill, 499 U.S. 65, 67 (1991), the examination of the factual and legal landscape at the time of the union's activity is crucial in determining whether the union's behavior is outside a wide range or reasonableness, so as to be arbitrary or irrational. By foreclosing inquiry into the history of this matter, in reviewing the petitioner's bad faith claims concerning those claims expressly found not to be barred by the Statute of Limitations, the courts below unfairly restricted the quantum of proof available to the plaintiff to show bad faith on the part of the union.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Buffalo, New York
September 30, 2002

Respectfully submitted,

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APPENDIX A
Order of the New York Court of Appeals,
Filed July 2, 2002.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the second day of July, 2002

PRESENT, Hon. Judith S. Kaye, Chief Judge, presiding

4-10 Mo. No. 552

Mahmood M. Yoonessi,

Appellant,

v.

State of New York,

Respondent.

(Claim No. 91461.)

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

DECISION July 2, 2002

4-10 Mo. No. 552
Mahmood M. Yoonessi,
Appellant,
v.

State of New York,
Respondent.
(Claim No. 91461.)

Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

APPENDIX B
Order of the New York Supreme Court, Appellate Division, Fourth Department Filed March 15, 2002.

MOTION No. 1592/01
DOCKET NO. CA 00-01-01793

PRESENT: PIGOTT, JR., P.J. HAYES, WISNER, SCUDDER, AND BURNS, JJ.

MAHMOOD M. YOONESSI,
CLAIMANT-APPELLANT,

v

STATE OF NEW YORK,
DEFENDANT-RESPONDENT.

(CLAIM NO. 91461.)

Appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered December 21, 2001.

Now, upon reading and filing the affidavit of Gerald T. Walsh sworn to February 1, 2002, the notice of motion with proof of service thereof, the opposing affirmation of Julie M. Sheridan dated February 13, 2002, and due deliberation having been had thereon,

It is hereby ORDERED that the motion be, and the same hereby is, denied.

Entered: March 15, 2002 CARL M. DARNALL, CLERK

APPENDIX C
Order and Opinion of The New York Supreme Court, Appellate Division, Fourth Department Entered December 21 , 2001.

APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

1592
PRESENT: PIGOTT, JR., P. J., HAYES, WISNER, SCUDDER AND BURNS, JJ.

CA 00-01793

MAHMOOD M. YOONESSI,
CLAIMANT-APPELLANT,

v.

STATE OF NEW YORK,
DEFENDANT-RESPONDENT.

(CLAIM NO. 91461.)

Mahmood M. Yoonessi having appealed to this Court from the order of the Court of Claims, entered in the Office of the Clerk of said Court on September 9, 1999, and said appeal having been argued by Mahmood M. Yoonessi, M.D., claimant-appellant, Julie M. Sheridan of counsel for defendant-respondent, and due deliberation having been had thereon,

It is hereby ORDERED that the order so appealed from be and the same is unanimously affirmed without costs.

Memorandum that is hereby made a part hereof.

Entered: December 21, 2001 CARL M. DARNALL, Clerk

MAHMOOD M. YOONESSI,
CLAIMANT-APPELLANT,

v.

STATE OF NEW YORK,
DEFENDANT-RESPONDENT.

(CLAIM NO. 91461.)

Order unanimously affirmed without costs. Memorandum: Claimant commenced this action against defendant, his former employer, alleging that defendant breached the collective bargaining agreement between defendant and claimant's union, the United University Professions (UUP). The Court of Claims properly granted defendant's motion for summary judgment dismissing the claim. It is well settled that, "when an employer and a union enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to the agreement may not sue the employer directly for breach of that agreement but must proceed, through the union, in accordance with the contract" (*Matter of Board of Educ. v Ambach,* 70 NY2d 501, 508, *cert denied sub nom. Margolin v Board of Educ.,* 485 US 1034). An exception arises where the employee alleges that the union breached its duty of fair representation, in which case the employee may litigate the contract dispute directly against the employer (*see, Matter of Board of Educ. v Ambach, supra,* at 508). Here, claimant alleges that the UUP breached its duty of fair representation by failing to defend him adequately at the arbitration held on the disciplinary grievance and by failing to pursue his eight other grievances to arbitration. We nevertheless conclude, however, that the claim was properly dismissed.

The claim is not viable to the extent that it is dependent upon the allegation that the UUP breached its duty of fair representation by failing to defend claimant adequately at the arbitration held on the disciplinary grievance. The applicable Statute of Limitations with respect to the claim against defendant is four months from "the date the employee or former employee knew or should have known that the breach [of the union's duty of fair representation] has occurred, or within four months of the date the employee or former employee suffers actual harm, whichever is later" (CPLR 217 [2][b]; *see, Obot v New York State Dept. of Correctional Servs.*, 256 AD2d 1089, 1090). The arbitrator issued the determination finding claimant guilty of misconduct on February 1, 1991, and the UUP refused to commence a CPLR article 75 proceeding on claimant's behalf to challenge that determination. Thus, claimant knew by February 1991 of the UUP's alleged breach of the duty of fair representation but did not file this claim until April 3, 1995.

The claim also is not viable to the extent that claimant alleges that the UUP breached its duty of fair representation by failing to pursue the eight other grievances to arbitration. Claimant is barred by the doctrine of collateral estoppel from so alleging. Collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v. New York Tel. Co.*, 62 NY2d 494, 500). The doctrine of collateral estoppel applies to quasi-judicial determinations of administrative agencies (*see, Ryan v. New York tel. Col, supra,* at 499). Claimant filed an improper practice charge with the Public Employment Relations Board (PERB), alleging, *inter alia,* that the UUP failed to process his eight other grievances. The Acting Director of PERB dismissed the charge, and that

determination was affirmed by PERB. Claimant argued before PERB that the UUP failed to pursue his eight other grievances to arbitration, and thus he is collaterally estopped from raising that argument again in this case.

Because claimant cannot show that the UUP breached its duty of fair representation, which is an essential element of the breach of contract claim against defendant (*see generally, Matter of Board of Educ. v Ambach*, supra, at 508), the claim was properly dismissed. Finally, claimant contends that the court erred in its resolution of the fee dispute between claimant and his former counsel. Although claimant took an appeal from the order concerning the fee dispute, claimant failed to perfect that appeal. In any event, the record is inadequate for this Court to address claimant's contention (*see, Usyk v. Track Side Blazers*, 182 AD2d 1125). (Appeal from Order of Court of Claims, Lane, J. - Summary Judgment.)

PRESENT: PIGOTT, JR., P.J. HAYES, WISNER, SCUDDER AND BURNS, JJ. (Filed Dec. 21, 2001.)

APPENDIX D
Opinion of the New York Court of Claims.

COURT OF CLAIMS OF THE
STATE OF NEW YORK

MOTION NO. M-59684
CLAIM NO. 91461

DR. MAHMOOD M. YOONESSI,
Claimant,

vs.

THE STATE OF NEW YORK,
Defendant.

ORDER

BEFORE: HONORABLE JOHN P. LANE
Judge of the Court of Claim

APPEARANCE FOR CLAIMANT:
Mark G. Farrell, Esq.
Albert Grande, Esq.

APPEARANCE FOR DEFENDANT:
HON. ELIOT SPITZER
Attorney General of the State of New York
By: William D. Lonergan
Assistant Attorney General
And Gerard John DeWolf, Esq,
Counsel to United University Professions

The Court read the following papers numbered 1 through 11 on defendant's motion for an order dismissing the claim pursuant to CPLR 3211(a)(5) and (7):

	Papers numbered
Notice of motion with annexed Supporting affidavit of Assistant Attorney General William D. Lonergan, sworn to May 26, 1999; Exhibits 1through 53; and memorandum of law	1
Affidavit in opposition of Mark G. Farrell, Esq., Sworn to June 24, 1999; affidavit of Mahmood M. Yoonessi, sworn to June 24, 1999, with Exhibits A through J; and memorandum of law	2
Further supporting affidavit of Assistant Attorney General William D. Lonergan, Sworn to July 6, 1999; affidavit in support of defendant's motions of Ivor R. Moskowitz, sworn to July 2, 1999 with Exhibits A and B; and reply affidavit of Anthony D. Wildman, sworn to July 2, 1999 with Exhibits I and II	3
Reply affidavit of Mahmood M. Yoonessi, Sworn to July 8, 1999; reply affidavit of Mark G. Farrell, Esq., sworn to July 9, 1999, with annexed Exhibits A and B	4
Defendant's supplemental memorandum of law, dated July 29, 1999	5
Supplemental affidavit of Mahmood M. Yoonessi, sworn to July 29, 1999, with Exhibits SA1 through SA5, and claimant's supplemental memorandum of law dated July 29, 1999	6
Supplemental affidavit of Assistant Attorney General William D. Lonergan, sworn to August 6, 1999	7
Notice of intention, claim, answer, amended answer	8, 9, 10, 11

This claim for $968,000.00 was filed April 3, 1995, and the answer was filed June 6, 1995. Among the affirmative defenses raised in the answer are res judicata and collateral estoppel based upon prior litigation in the Supreme Court of the State of New York and the U.S. District court for the Western District of New York; and that the claim is barred by the applicable statute of limitations contained in CPLR Article 2. A description of the facts and current procedural posture of the case is complicated by the fact that claimant has been represented by several different attorneys along the way as well as proceeding pro se at times, and has proceeded in several different forums.

Claimant, a physician, was employed by the School of Medicine of SUNY at Buffalo from 1976 until March 20, 1991, at which time he was terminated. During his tenure at the medical school, claimant belonged to a collective bargaining unit represented by the UUP (United University Professions) and was required to participate in a clinical practice plan, which was designed to regulate faculty-physicians' income generated from the care of patients in hospitals affiliated with the university, and to establish a system for reimbursement of costs and distribution of revenue. The clinical practice plan setup in Buffalo is complicated by the fact that there is no single university hospital at which faculty members practice, but rather a group of independent affiliated teaching hospitals. Dr. Yoonessi's personal situation was further complicated by the fact that he also practiced at several other nonaffiliated hospitals. Beginning in 1986, Dr. Yoonessi and others filed a number of grievances challenging various aspects of the clinical practice plan and its implementation. (Nine grievances were file on Dr. Yoonessi's behalf alone between July 10, 1987 and March 28, 1991. See Exhibit 7, Verified of Particulars.)[1] It appears from the papers that each department of the medical school handled its own clinical practice finances and that there was some lack of

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[1]Unless otherwise indicated, exhibit numbers refer to the exhibits numbered 1 through 53 in three binders accompanying defendant's moving papers.

uniformity among the departments with regard to various deductions made from physicians' income. Claimant has also alleged that at least one university physician was not required to participate in the plan at all.

The affidavit of UUP President William E. Scheuerman (Exhibit 52) addresses the response taken by UUP to the numerous clinical practice grievances as they proceeded to arbitration. Mr. Scheuerman indicates that the first of Dr. Yoonessi's grievances proceeded to arbitration and consumed 24 days of hearings during the period February 1990 to January 1992 with no conclusion in sight. By January 1992, UUP had spent tens of thousands of dollars on this single arbitration alone, with at least 33 more waiting (Dr. Yoonessi's and others) in the wings. In connection with collective bargaining negotiations for a new contract in 1992, the UUP, SUNY and the State agreed to meet with a third-party neutral in an attempt to arrive at a mutually agreeable global mediated resolution of all the various ongoing differences concerning the operations of the SUNYAB Health Science Center's clinical practice plan, including the outstanding grievances (Exhibit 52, at paragraph 16). Dr. Yoonessi was so notified by letter from then UUP President John M. Reilly dated July 8, 1992 (Exhibit A to Scheuerman affidavit). Despite Mr. Reilly's representation that the agreement "is designed to expedite the long delayed examination of these grievances by placing all of the issues before a neutral at one time," two years later, on July 7, 1994, his successor Mr. Scheuerman advised Dr. Yoonessi that the mediation process was still ongoing and stated: "[W]hile I am still hopeful that we can achieve a negotiated settlement, I have no intention of allowing this process to continue much longer and, if we have not been able to reach agreement with the State after the mediation sessions with arbitrator Carey scheduled for this summer, we will be returning to the arbitration process." Exhibit B to Scheuerman affidavit. The mediation process had also encompassed an agreement between SUNY and UUP that SUNY's attorney Rebecca Caudle and UUP's labor relations specialist Janice L. Moritz be excluded from participating in the process because of the enmity that had

developed between them while participating in the arbitration hearings on the first of Dr. Yoonessi's grievances. See reply affidavit of UUP Staff Director Anthony D. Wildman, sworn to July 2, 1999, at paragraph 5.

On or about January 1, 1988, however, even before the first grievance had gone to arbitration, Dr. Yoonessi had refused to participate further in the plan, and a notice of discipline threatening him with termination was issued August 30, 1988 (Exhibit 10). The five allegations of misconduct therein-included four related to Dr. Yoonessi's failure or refusal to comply with various provisions of the clinical practice plan. The fifth ground, having to do with performing medical procedures in nonaffiliated hospitals, was later withdrawn. Dr. Yoonessi grieved the notice of discipline and the matter proceeded to arbitration, with UUP attorney Ivor R. Moskowitz representing Dr. Yoonessi. The arbitration hearing was conducted July 11, 1990, September 17, 1990, and December 18, 1990. The arbitrator's award dated February 1, 1991 concluded that Dr. Yoonessi had "engaged in a persistent course of insubordination," (Exhibit 17a, at 26) and directed that he be given "thirty (30) days from the day the Union receives this Award to comply fully with the directives set forth in specifications 1 through 4 of the Notice of Discipline," failing which the employer "shall have the right to terminate Grievant" (Exhibit 17a, at 27).

In response to the arbitrator's award, claimant engaged in some discussions with attorney Moskowitz, and Moskowitz in turn sought further clarification from the arbitrator, Thomas N. Rinaldo, who informed him that the award was clear on its face and required no further explanation. See affidavit of Ivor R. Moskowitz, sworn to July 2, 1999, at paragraphs 15 through 24, and Exhibit B thereto. Dr. Yoonessi's problem with the arbitrator's decision stemmed from the language requiring him to comply fully with the directives set out in the notice of discipline. He concluded that the billing records and monies he was required to submit should be limited to the period of time covered by the notice of discipline, *i.e.* January 1, 1988 through August 30, 1988. The university, however, chose to interpret the arbitrator's decision as requiring compliance from

January 1, 1988 to the date of the award. Mr. Moskowitz advised claimant to protect himself by providing the fullest possible information and compliance, and claimant indicated that he intended to do so, although he had some questions about whom he was supposed to deliver the documents to. See Exhibits 18 through 21. Dr. Yoonessi's attempts at compliance, however, were deemed inadequate, apparently because the university administration believed he had underreported his income to them, (see Lonergan affidavit at paragraphs 35 through 43) and he was terminated on March 20, 1991.

By letter dated March 22, 1991, Mr. Moskowitz informed claimant that he had discussed his rights under Article 19 of the collective bargaining agreement with his private attorney (W. James Schwan) and that the chances of vacating the arbitration award were poor. He did, however, suggest that claimant contact UUP's labor relations specialist Jan Moritz, who was then handling the practice plan grievances, to discuss "the possibility of filing a grievance contesting your termination." Exhibit 22. Claimant then retained Mr. Schwan to file a petition to vacate the arbitrator's award pursuant to CPLR 7511 on the grounds, inter alia, that the arbitrator had exceeded his powers and that the award was procured through false testimony of witnesses for the State. The petition was dismissed by order of Hon. Thomas P. Flaherty, JSC, entered February 4, 1993.

With new counsel, Albert Grande, claimant filed a complaint January 29, 1993 in U.S. District Court for the Western District of New York. In that complaint, he alleged discrimination and retaliation on the basis of national origin in violation of Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, and 452 USC sections 1981, 1983, and 1985. He also alleged that SUNY, Children's Hospital and Millard Fillmore Hospital terminated him, terminated his staff privileges, and denied his application for staff privileges, respectively, without giving him an opportunity to be heard, in violation of his due process rights, and because of his national origin. He further alleged that he suffered damages because of the practice plan's failed billing system and SUNY's

discriminatory conduct. Finally, he alleged he was denied the opportunity for a "name-clearing" hearing; in violation of due process. In a decision issued August 26, 1994, and reported at 862 F. Supp. 1005 (Exhibit 26), U.S. District Judge Richard Arcara affirmed a judgment and order entered by Magistrate Judge Carol E. Heckman granting the defendant's motion for summary judgment. The Court dismissed the allegations of constitutional deprivations against SUNY, which is an integral part of the State of New York, on Eleventh Amendment grounds. It dismissed the Title VII claims against SUNY, Children's Hospital and the Erie County Medical Center for failure to file timely charges with EEOC or the State Division of Human Rights, and the remaining section 1981, 1983 and 1985 claims against those same defendants for failure to file within the three-year statute of limitations provided in CPLR214(5). With respect to the Millard Fillmore Hospital defendants, the Court found that the Title VII claims were untimely, and that although claimant's notification that he would be denied a staff appointment and privileges fell within the three-year period of limitations the complaint was totally devoid of allegations essential to pleading claims for relief under sections 1981, 1983, 1985. [2]

Claimant's petition for leave to appeal Judge Arcara's decision was denied by a per curiam decision of the U.S. Court of Appeals for the Second Circuit on May 30, 1995 (56 F.3d 10) (Exhibit 27); and his petition for writ of certiorari was denied January 16, 1996 (516 U.S. 1075) (Exhibit 28).

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[2]The Court observed that the CPLR 214(5) period begins to run "when the plaintiff knows or has reason to know of the injury which is the basis of the action. Barrett v. United States, 689 F2d 324, 333 (2d Cir. 1982), cert. denied, 462 U.S. 1131, 103 S.Ct 3111, 77 L.Ed.2d 1366 (1983). In the context of a claim for wrongful termination of employment actionable under these statutes, the limitations period begins to run "when the employee receives notice that the decision to terminate has been made, not the point at which the termination ultimately becomes effective. Chardon v. Fernandez, supra, 454 U.S. at 8, 102 S.Ct. At 29." Yoonessi v State Univerwith of New York, 862 F.Supp. 1005, 1015. The accrual date for Title VII with respect to SUNY was thus concluded to be the date of receipt of the Augsut 30, 1988 notice of discipline, not the actual termination date of March 20, 1991. Exhibit 26.

Following the adverse determination from Judge Arcara, claimant filed an improper practice charge against the UUP alleging breach of the duty of fair representation, and against his employer alleging breach of contract. The charge was filed with the New York State Public Employment Relations Board (PERB) on or about November 2, 1994, and alleged, inter alia, that the arbitrator's award was procured through fraud and that UUP's failure to fairly represent claimant "has led to the dismissal of complaints filed by the complainant's attorney in the Supreme Court of the State of New York and the Federal Court on grounds of timeliness."

In the meantime, on December 6, 1994, attorney Jules L. Smith, who was representing UUP with respect to the global mediation of grievances regarding the clinical practice plan, had sent a letter to claimant's counsel, Albert Grande, outlining the terms of a proposed settlement as it would affect claimant. The terms included a payment of $75,000.00, acceptance of a letter of resignation from Dr. Yoonessi in lieu of the disciplinary termination previously imposed, discontinuance with prejudice by UUP of all pending grievances filed on Dr. Yoonessi's behalf, dismissal with prejudice of Dr. Yoonessi's then pending improper practice charge before PERB, dismissal of all pending proceedings brought by Dr. Yoonessi against the State of New York and an agreement to file no new proceedings, and the State's agreement not to interfere with Dr. Yoonessi's privileges to practice medicine at any of the hospitals at which he practices (Exhibit 30). On December 12, 1994, claimant's new counsel Nicholas J. Sargent responded with a counter-offer agreeing to the nonmonetary terms of the proposed settlement, but demanding payment of $650,000 plus reasonable attorney fees (Exhibit 31).

There was further correspondence between the two attorneys. Mr. Smith articulated UUP's position that Dr. Yoonessi's monetary demands had been escalating while he had steadfastly refused to allow the State to audit his billings to substantiate his demands, that the global settlement was proceeding and was hoped to be resolved by December 21, 1994, and that if Dr. Yoonessi refused the $75,000 and continued to adhere to his position, he would likely be

left out of the monetary settlement and receive nothing. "[H]e must either agree to a full audit to substantiate the monies he wants to recover or accept the $75,000.00 presently being offered. In lieu of that, he will most likely get nothing" (Exhibit 32). Mr. Sargent advised that the $75,000 figure was unacceptable and that the matter should be set down for a hearing (presumably before PERB) (Exhibit 33). Claimant subsequently requested that the unfair practice charge be withdrawn, a request that was granted by PERB by letter dated February 15, 1995 (Exhibit 29).

It was at this point, that claimant turned to the Court of Claims, filing a notice of intention on January 23, 1995, and his claim on April 3, 1995.

The global settlement, however, was not achieved in December 1994 as had been hoped. According to Mr. Scheuerman's affidavit, the change in administration of the State government following the gubernatorial election of November 1994 and the shifting of personnel within both State government and SUNY administration resulted in a temporary stalling of the mediation process. Informal discussions continued through 1995 and culminated in a final settlement in the winter months of 1995- 1996, which was signed March 29, 1996. In addition to negotiated improvements in the clinical practice plan, the mediated settlement provided for resolution of the thirty-four pending clinical practice grievances for a total sum of $194,700, the largest single component of which was the $75,000 to be paid to Dr. Yoonessi (Exhibit 52, at paragraphs 19 through 23).

Accordingly, by letter dated May 1, 1996, Mr. Scheuerman advised claimant that a settlement had finally been reached and that SUNY had agreed to a payment of $75,000. The letter went on to state: "Mediation, in particular, was a very appropriate mechanism for resolving these disputes. As the Memorandum [3] says: 'The volume of cases, and the complexity of the issues involved, would

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[3]State-UUP Memorandum of Understanding (M.O.U.) On Clinical Practice Matters at the State University at Buffalo, at 1. Exhibit C to Scheuerman Affidavit.

have led to protracted case by case arbitrations and potentially inconsistent rulings as different arbitrators reviewed specific, isolated issues.' Although I am displeased with the length of time this mediation has taken, I am pleased SUNY has recognized many of the concerns UUP has expressed." (Exhibit 35). The stipulation of settlement annexed to Mr. Scheuerman's letter also provided that UUP would withdraw with prejudice the specifically referenced grievances and any other pending grievances interposed by Dr. Yoonessi relating to the same facts and circumstances.

Still dissatisfied with the settlement, claimant proceeded, by attorney Albert Grande, to find another unfair practice charge with PERB on June 19, 1996. The charge again alleged that the arbitrator's decision on the notice of discipline had been procured through the fraud of State officials. It alleged that UUP had improperly refused to proceed to arbitration with claimant's grievance dealing with the issue of his compliance with Arbitrator Rinaldo's award. It alleged that from July of 1992 through July of 1994 UUP officials had led claimant to believe that meetings were taking place and a settlement should be forthcoming in the mediation process for all the outstanding practice grievances. It set forth in paragraph 15 the allegations of breach of fair representation and breach of contract made to PERB in the prior charge of November 2, 1994, and realleged those charges. Finally, it further alleged "that the UUP's latest communication clearly demonstrates bad faith, as well as conspiracy and collusion with SUNY officials. There is a consistent pattern of fraud, deception, and attempts at obstruction of justice by the State and UUP representatives. These have resulted in petitioner's loss of his position and hundreds of thousand [sic] of dollars of earned income." (Exhibit 36).

The PERB charge was dismissed by order of Acting Director Kenneth J. Toomey dated July 12, 1996. He concluded that the applicable four-month statute of limitations barred consideration of State and UUP conduct that had occurred prior to February 16, 1996, leaving only UUP's notice to Dr. Yoonessi of its mediated settlement of his grievances with the State. The decision went on to state that with respect to the mediated settlement, the pleadings

revealed Dr. Yoonessi's disagreement with the way in which his grievances were settled, but "do not establish the arbitrary, discriminatory or bad faith conduct necessary for a violation of a union's duty of fair representation." (Exhibit 37).

On November 20, 1996, PERB denied claimant's exceptions to the Acting Director's determination and dismissed the improper practice charge. See Exhibit 38. The decision noted that it is not the policy of the Board to substitute its view of a proper settlement for that reached by a union, relying on Air Line Pilots Intl v O'Neill, 499 U.S. 65, which described the standard of review of union conduct as follows:

> Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. For that reason, the final product of the bargaining process may constitute evidence of a breach of the duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary.'" 499 U.S. at 78 (citations omitted).

Claimant then brought, pro se, an Article 78 proceeding to seek relief from the PERB decision. The proceeding was dismissed by order of Hon. Nelson H. Cosgrove, JSC, dated March 19, 1997 on the grounds that (1) claimant had failed to name a necessary and indispensable party (PERB); and (2) the Court lacked personal jurisdiction over the State University of New York (Buffalo) (Exhibit 39).

Having failed in State Supreme Court, claimant, by attorney Albert Grande, turned again to federal court. On November 4, 1996, he filed another action (96-CV-752A [H]) in the Western District of New York focusing on the inadequacy of the $75,000 settlement; again alleging that SUNY at Buffalo owed him hundreds of thousands of dollars, alleging that at least three other physicians were not participating in the clinical practice plan; alleging that SUNY at Buffalo had notified Sisters Hospital of two

alleged malpractice suits against him in violation of the May 1, 1996 settlement agreement; alleging that Antonina Canazzi, an agent of SUNY, had admitted receiving compliance materials from him related to the arbitrator's award on March 4, 1991, and having done nothing with them thereby leading to his termination; and alleging that such conduct constituted disparate treatment of him in violation of the Civil Rights Act of 1991. On August 18, 1997, Magistrate Judge Heckman filed a Report and Recommendation, recommending that defendants' motions to dismiss be granted and summary judgment be entered in favor of defendants. Claimant filed objections to the Report and Recommendation, and Judge Arcara made de novo review of the Report and Recommendation, ultimately adopting its proposed findings by order dated November 18, 1997. The order concluded that claimant had failed to allege sufficient facts to establish the existence of a separate discriminatory employment practice connected with the settlement and therefore was bound by the prior determination that his employment discrimination claims were untimely. "All he has alleged in support of his claim that defendants violated Title VII is that they reached an agreement that he thought was too low, and that SUNY badmouthed him to other area hospitals. Aside from conclusory statements that these events were discriminatory, plaintiff has not alleged one fact that shows that the settlement offer was low because he is Iranian" (Exhibit 44 at 4). Judge Arcara's order was affirmed by the United States Court of Appeals for the Second Circuit on September 30, 1998 (164 F.3d 620) (Exhibit 45).

In the Court of Claims, defendant previously moved for summary judgment (M-54156) seeking dismissal of the claim on the grounds of arbitration and award, collateral estoppel, and the existence of a defense based on documentary evidence (the 1996 settlement stipulation). The motion was heard November 13, 1996. In an order filed February 24, 1997, the motion was denied: (1) because the documentary evidence defense was not raised in the answer; (2) because the arbitration and award defense was not raised in the answer, and because, in any case no award had actually been made on the clinical practice grievances; (3) because the

grievance raised with respect to claimant's termination was never taken to arbitration and the alleged discriminatory motive for the disciplinary charge could support a charge of unfair representation; and (4) because a determination based upon collateral estoppel could not be made given that the moving papers provided no indication of what had been done in federal court and given that the complaint filed in State Supreme Court to recover fees for claimant's services was dismissed for failure to exhaust claimant's contractual remedies under the collective bargaining agreement.

A subsequent motion by UUP for a protective order in the Court of Claims action (M-55842) heard October 8, 1997 also raised issues of collateral estoppel and res judicata. The Court's order filed January 5, 1998, concluded first that the movant UUP, which cannot be a defendant in this Court, lacked standing to raise affirmative defenses of res judicata, collateral estoppel and settlement that had not been pleaded.[4] The order also concluded that in any case the PERB proceedings had no binding effect on this Court because claimant had not had a full and fair opportunity to litigate the issues of his claim in those proceedings.

In the motion currently before the Court, the defendant again raises the collateral estoppel and res judicata defenses, and, in its reply papers, a statute of limitations defense based on CPLR 217(2).

It is well established in the context of both federal and New York State Cases that an employee who belongs to a collectible bargaining unit represented by a labor organization may not sue an employer directly for breach of the collective bargaining agreement except where the contract otherwise provides or where "the union fails in its duty of fair representation." Matter of Board of Educ. v Ambach, 70 NY2d 501, 508, Cert denied sub nom Margolin v Board of Educ., 485 US 1034. Absent such circumstances, the

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[4]The defenses of res judicata and collateral estoppel had been raised with reference to the State Supreme Court and federal court actions, but not with respect to the PERB proceedings with which UUP was concerned, and which occurred subsequent to filing of the original answer. An amended answer was filed May 1, 1998, that remedied the deficiencies of the original answer.

employee is limited to the grievance procedure provided for in the collective bargaining agreement. The union's duty of fair representation is implied by its statutory position as exclusive bargaining agent for its members, however, (See Vaca v Sipes,386 US 171, 177), and an employee's right to bring an action for breach of the duty exists "notwithstanding the outcome or finality of the grievance or arbitration proceeding." (DelCostello v Teamsters, 462 US 151, 164.) In Shah v State of New York, 140 Misc2d 16, the late Judge Edwin Margolis of this Court provided an excellent discussion of the issues involved in an individual employee's bringing an action against the State of New York for breach of a collective bargaining agreement. Such an action is complicated by the facts that a suit for monetary damages against the State of New York must be brought in the Court of Claims, which has no jurisdiction over a labor union, and that an employee must prove the union has breached its duty of air representation before he or she can proceed to litigate the merits of the claim against the employer. Relying on Jackson v Regional Tr. Serv., 54 AD2d 305, and Albino v City of New York, 80 AD2d 261, Judge Margolis concluded that the union was not a necessary party to the action against the employer, and, consequently that the employee could proceed against the State of New York in the Court of Claims. "Although the union is not and cannot be a party to the action, the union's actions in representing claimant's interests in the arbitration will be an element of the cause of action and claimant must plead and prove the union's breach in order to reach the question of whether the State breached the terms of the collective bargaining agreement." 140Misc2d at 20. In order to establish a breach of the duty of fair representation, an employee must prove that the union's conduct was "arbitrary, discriminatory or in bad faith." (Matter of Civil Serv. Bar Assn. V City of New York, 64 NY2d 188, 196, quoting Vaca v Sipes, 386 US 171 at 190). Mere negligence on the part of the union does not constitute a breach of the duty. (Smith v Sipes, 67 NY2d 928, revg. 109 Ad2d, 1034, 1036 [dissenting opn].)

Claimant here appears to be mistakenly relying on Shah v. State of New York , supra, to support his contention that the action is not

time-barred. At the time Shah was decided, there was no specific statute of limitations in New York dealing with claims of unfair representation and breach of collective bargaining agreements. The Court of Appeals in Baker v. Board of Educ., 70 NY2d 314, had previously concluded that

the federal six-month period of limitations for bringing unfair labor practice charges pursuant to the National Labor Relations Act did not apply because the cause of action for breach of duty of fair representation in New York arises from article 14 of the Civil Service Law, known as the Taylor Law (Civil Service Law sections 200 et seq), and that the catch-all provision of CPLR213 [1], a six-year statute, should be applied until the legislature imposed a different rule. Although Baker v Board of Educ., supra, being a lawsuit against a union made no ruling with respect to actions against employers, Judge Margolis concluded therefrom that either CPLR 213 [1], or CPLR 213 [2], the six-year statute governing breach of contract actions, should be applied in the context of an action against the State as employer. The legislature subsequently took action to create a four-month statute of l imitations for such actions as against both labor organizations and employers, CPLR 217 [2] (enacted by laws 1990, ch 467, section 1, effective July 11, 1990). Thus, by the time claimant filed his lawsuit with this Court on April 3, 1995, any allegations based upon breach of the duty of fair representation that had occurred prior to December 3, 1994 were time-barred.

Claimant's counsel understandably has objected to arguments initially made in defendant's reply papers (see Azzopardi v American Blower Corp., 192 NY2d 453; Dannasch v Bifulco, 184 AD2d 415; Ritt v Lenox Hill Hosp.,182 AD2d 560; Kantor v Pavelchak, 134 AD2d 352). That, however, does not alter the fact that the statute of limitations defense was properly raised in defendant's answer, and that in determining a motion for summary judgment, the Court is free to search the record in the case and can even grant summary judgment to a nonmoving party. See, e.g., Florio v City of New York, 226 AD2d 148, appeal dismissed in part and denied in part 89 NY2d 855; Shectman v Sverdrup & Parcel

Consultants, Inc., 226 Ad2d 268 (even though defendant's cross motion for partial summary judgment was directed to only the second and third causes of action, search of the record warranted dismissal of the entire complaint against that party). The cases relied upon by claimant emphasize that the purpose of CPLR 3212 is to provide an accelerated disposition of cases, where appropriate, and this Court is not going to ignore a valid stature of limitations defense and proceed to trial on time-barred issues simply because the statute of limitations issue was not raised in defendant's initial motion papers.

It appears unquestioned that claimant's disputes over the provisions and implementation of the clinical practice plan were proper subjects for the contractual grievance procedure and were in fact processed as such, although not to a termination with which claimant was happy. Except for the allegations of breach of duty of fair representation, these matters would not be a proper subject at all for exercise of the Court's jurisdiction. See Matter of Board of Educ. v Ambach, 70 NY2d 501, 508, supra. Thus, the only issues before the Court at this time are the allegations of breach of duty of fair representation, which are clearly covered by the short statute of limitations contained in CPLR 217 [2]. The only such allegations not already time-barred are those that relate to negotiations involving the so-called global settlement and exchange of letters in December 1994, and the subsequent consummation of the settlement and communication of it to claimant in May of 1996.

As the Court sees it, any allegations pertaining to the termination of Dr. Yoonessi's employment, the circumstances surrounding his attempts to comply with Arbitrator Rinaldo's directives, the disappearance of records supplied to Ms. Canazzi, the union's failure/refusal to take his grievance over the manner in which he was terminated to arbitration, the mechanics of the clinical practice plan, or his receiving disparate treatment with respect to participation in the clinical practice plan, or his receiving disparate treatment with respect to participation in the clinical practice plan because of his national origin are barred either (1) for untimeliness pursuant to CPLR 217 [2], (2) because the exclusive method for

their resolution lay in the contractual grievance procedure (see Matter of Board of Educ. v Ambach, supra) or (3) because they were previously adjudicated in either the federal court action or in claimant's attempts to vacate the arbitrator's decision in State Supreme Court (see Schwartz v Public Administratory of County of Bronx, 24 NY2d 65).

Moreover, with respect to the allegation not yet time-barred, claimant's federal court action has already raised the question whether he was discriminated against with respect to the outcome of the global settlement, with Judge Arcara finding no evidence of disparate treatment based upon his Iranian national origin in connection with the settlement (Exhibit 44, at 4). Judge Arcara's dismissal of the federal complaint was on the merits, and consequently, entitled to res judicata effect. See McKinney v City of New York, 78 AD2d 884. Consequently, the Court concludes that any claims arising from the alleged inadequacy of the settlement or the manner in which it was negotiated or communicated to claimant have already been fully litigated in federal court and are now barred by the doctrine of collateral estoppel. See, Schwartz v Public Administrator of the County of Bronx, 24 NY2d 65, supra. In New York, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." O'Brien v City of Syracuse, 4 NY2d 353, 357; Smith v Russell Sage Coll., 54 NY2d 185; Matter of Reilly v Reid, 45 NY2d 24; Feigen v Advance Capital Management Corp., 146 AD2d 556, 558. Moreover, whether a particular argument was actually advanced and considered in the prior proceeding is irrelevant. The matter, assuming it arises out of the same transaction or series of transactions, is barred so long as the argument could have been made in the prior proceeding. See County of Nassau v New York State Pub. Employment Relations Bd., 151 AD2d 168, 186, affd 76 NY2d 579.

This Court is of the opinion both that the principles of collateral estoppel and res judicata bar this action, and that review of the

record would in any case support the conclusion that the defendant is entitled to summary judgment on the ground that there are no material issues of fact requiring a trial. The standard for an action alleging breach of duty of fair representation is a high one. The union's failure or refusal to process a grievance, or method of handling the grievance must be shown to be more than merely negligent of perfunctory. It must be shown to be arbitrary, discriminatory, or in bad faith. Vaca v Sipes, 386 US 171, 190. "A settlement is not irrational simply because it turns out in retrospect to have been a bad settlement." Air Line Pilots Assn Intl v O'Neill, 499 US 65, supra, at 79. The papers before the court include affidavits of UUP officials who have provided a credible, rational, business-related explanation for the decision to explore mediation and arrive at the settlement they did. The record also includes December 1994 correspondence from the UUP attorney beseeching claimant to participate in the process by permitting an audit of his accounts if he believed his share of the settlement to be inadequate. The record establishes that claimant was one of many who had grieved the clinical practice plan, and that he received the largest single share of the settlement proceeds. Although clearly claimant may have been victimized by SUNY employees who misplaced, mishandled or lost documents he submitted in March 1991 in connection with Arbitrator Rinaldo's decision, the Court finds it incredible that he was thereby unable to supply the mediation team with any documentation whatever to support his claim to a settlement in excess of the $75,000 offered in December 1994. It is manifest from the documentary evidence in the record that claimant simply refused to cooperate in the mediation and chose to seek a better deal elsewhere.

In response to the motion, claimant's affidavits merely reiterate his objections to the administration of the clinical practice plan; reemphasize his dissatisfaction with the contents of the settlement; and reassert that the UUP acted arbitrarily in removing labor relations specialist Janice L. Moritz from participation in resolution of the clinical practice grievances, an action that occurred in the summer of 1992 and one for which the UUP provided a reasonable

explanation.[5] Further, the claimant's allegations of bias against him by the UUP attorney Mr. Moskowitz with respect to the termination are also time-barred and of no relevance in relation to the terms of the global settlement. Again, claimant's affidavits focus upon the specifics of his objections to the clinical practice plan, upon his difficulties dealing with attorney Moskowitz, and his objections to the arbitrator's decision and the manner in which compliance with it was handled. Claimant's most recent submission includes information about a June 1999 improper practice charge filed with PERB relating to clinical practice payments and documents that suggest many members of the Department of Obstetrics and Gynecology were unhappy with UUP's involvement in the grievance processing and mediation settlement. See Exhibits SA1 and SA5. The latest improper practice charge, however, indicates that it refers to UUP's refusal to process grievances through arbitration "[b]eginning on July 1, 1998, and continuing up to the date of this improper practice charge." Exhibit SA1. Given the time-frame involved, this latest PERB charge has nothing whatever to do with claimant's case. At best, the exhibit tends to show that other faculty members were dissatisfied with the UUP's procedures

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[5]The transcript of Ms. Moritz' examination before trial (Exhibit F of claimant's opposing papers) contradicts claimant's position that there was no indication she should have been removed because of hostility towards the State's representative. Claimant observed Ms. Moritz to have handled herself calmly and professionally throughout the course of the arbitration proceedings, and there is no reason to doubt that. Claimant, however, was not in a position to know all that was going on. Ms. Mortiz herself testified that she had constantly complained to Anthony Wildman of Ms. Caudle's constant . . .antics which caused delay after delay in the arbitration proceeding" (Exhibit F, 1t 162). When Mr. Wildman informed her that she would be excluded from the mediation process "because it was the only way they could also not have Rebecca Caudle involved, (Id., at 161), Ms. Moritz interpreted the meaning of his statement as follows: "My interpretation at that time was that . . .I certainly perceived her as an obstructionist, and I related that to Mr. Wildman. So, if they were looking to get resolution, and in a mediation process, then I - - certainly the union viewed her an obstructionist, and I would be willing to guess that the state probably viewed me in the same light, as an obstructionist. And that's why we were both taken off the process." (Id., at 163). Ms. Moritz was replaced by two UUP labor relations specialists from other facilities.

and that Dr. Yoonessi was not singled out on an individual basis.Further, the filing of a charge does not prove the validity of the allegations contained therein.

Giving all due deference to the arguments of counsel made on claimant's behalf, the Court is unable to conclude that there are any material issues of fact requiring a full hearing for resolution. The Court also finds it necessary to note that despite claimant's numerous allegations of perjury, fraud, conspiracy and other wrong-doing in connection with the clinical practice plan, the arbitration proceeding, the loss of documents by Antonina Canazzi, the removal of Janice Mortiz from the grievance and mediation proceedings, and the term of the 1996 settlement, claimant to date has failed to present one iota of proof to support any of his assertions, whether time-barred or not. Moreover, as indicated above, claimant has already litigated this matter in another forum.

Accordingly, for the reasons set forth above, it is hereby ORDERED that the defendant's motions for summary judgment is granted and Claim No. 91461 is dismissed.

Dated: August 25, 1999
Buffalo, New York

John P. Lane
Judge of the Court of Claims